88-915

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TEAMSTERS LOCAL 315,

Petitioner,

vs

UNION OIL COMPANY OF CALIFORNIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision below, which denies arbitration of a dispute concerning an alleged violation of seniority provisions of a collective bargaining agreement, rests upon an evaluation of the merits of the dispute and thereby fails to apply the legal standards established by this Court for submission of labor controversies to arbitration.

2. If the first question is answered in the affirmative, whether the departure from those standards by the court below is of such a character as to warrant summary reversal without further proceedings.

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TEAMSTERS LOCAL 315

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Teamsters Local 315 petitions for the issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in Teamsters Local 315 v. Union Oil Company of California, No.87-2449 on the dock of the Court of

Appeals, and further requests that said decision and judgment be summarily reversed.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 856 F.2d 1307 (C.A.9, 1988), and is reproduced in Appendix A, infra. The Opinion of the United States District Court for the Northern District of California is unreported, and is reproduced in Appendix B, infra.

JURISDICTION

The decision of the Court of Appeals was filed on September 2, 1988. Jurisdiction of this Court is based on 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is Section 301 of the National Labor Rela-

tions Act, as amended, 29 U.S.C. Section 185, which reads as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Complaint in this case was filed pursuant to Section 301 of the National Labor Relations Act, as amended (29 U.S.C. Section 185) to compel arbitration of a dispute arising under a collective bargaining agreement. The matter was submitted to the trial court upon cross motions for summary judgment. Following hearing, the United States District Court

for the Northern District of California granted Petitioner's motion and directed that Respondent arbitrate the dispute in accordance with the grievance and arbitration provisions of the collective bargaining agreement. Respondent's motion was denied. Upon appeal, the District Court's decision was reversed with instructions to grant Respondent's motion.

The underlying facts and the proceedings below may be summarized as follows:

1. The Facts

Norman Simon, an employee of Respondent, hereafter referred to as Unocal, suffered an industrial injury resulting in a period of disability during which he was unable to work. Simon was subsequently released to return

to his job by his physician, and notified Unocal that he wished to go back to work, but Unocal directed that he first be examined by its physician. Unocal's physician expressed the opinion that Simon had not sufficiently recovered to enable him to perform his job, and Unocal thereupon refused to permit him to work. Simon was placed on continuing leave without affecting his accrual of seniority.

Petitioner, hereafter referred to as the Union, filed a grievance under the agreement between the parties asserting that Unocal's refusal to return Simon to work violated the seniority provisions of the agreement. It was the Union's position that Simon was physically and medically able to perform the work, and that the seniority provisions of the

agreement required Unocal to permit him to work in accordance with his seniority rather than to be placed on involuntary leave. Unocal declined to process the grievance to arbitration on the ground that the dispute was not subject to arbitration under the agreement. The complaint to compel arbitration was thereafter filed.

2. The Contractual Grievance and Arbitration Provisions

The grievance and arbitration provisions of the agreement provide for conventional steps in resolving disputes between the parties. Thus, an initial effort to settle the matter must be made by the employee involved and his immediate supervisor. Failing settlement, a written grievance is to be submitted, followed by a meeting between Unocal's

terminal manager and "the complainant." If the controversy remains unsettled, the Union is entitled to request arbitration. The arbitration procedure calls for a separate arbitrator to be designated by each of the parties and that the two are to "meet and endeavor to resolve the dispute." If the partisan arbitrators are not able to agree, they must, on request of the Union, select a third neutral arbitrator, thereby forming a three person arbitration board which has authority to make a "final and binding" decision.[1]

Several provisions of the grievance and arbitration agreement are relevant to the scope of its coverage. These include

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[1]The grievance and arbitration provisions of the agreement appear in Article IX, which is reproduced in full in Appendix C, infra.

Article IX(A), which reads in applicable part (App.C, p.10):

> Any employee or group of employees with their Union representative if so desired shall have the right to present grievances which allege violations of any of the express terms or provisions of this Agreement.

Article IX(D), which describes the arbitration procedure, states that these procedures are applicable to "a grievance which raises a bona fide question concerning the interpretation or application of any express provision of this Agreement [not settled under the earlier steps of the grievance procedure]" (App. C, p.13). Finally, under the heading "Limitations," Article IX(E) provides (App. C, p.18):

> Only actions of the Company which are alleged to be violations of duties or obligations expressed in one or more of the

> written provisions of this Agreement shall be subject to the grievance and arbitration procedure.

3. The Decision of the District Court

In directing arbitration of the dispute involved in this case the District Court relied principally on Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), one of the Steelworkers Trilogy which established the legal principles governing the role of arbitration in collective bargaining agreements. Noting that the underlying dispute in American Manufacturing was "nearly identical" to that involved in this case, the District Court concluded that here, as in the cited decision, the Union's claim "that the company had violated a specific provision of the

contract" subjected the dispute to arbitration (App. B, pp. 6-7, quoting from American Manufacturing, 363 U.S. at 569). The District Court recognized that the arbitration clause in American Manufacturing "was broader than . . . in the present case", but stated in its decision that in considering the scope of arbitration agreement "doubts should be resolved in favor of arbitrability" (App. C., pp. 6, 7-8).

4. The Decision Below

The court below reversed the District Court, Judge Pregerson dissenting. According to the Court of Appeals, the references in the agreement which limit arbitration to alleged violations of its express provisions exclude the dispute involving the seniority rights of Simon in the circumstances of

this case. Thus, the court below concludes that Simon's "express seniority rights under the agreement" could not have been violated because he "continue[d] to accrue seniority" following Unocal's refusal to permit him to return to work. (App. A, p. 9). The Union's contrary contention was found to be "conclusory" because those provisions "contain nothing regarding an implied 'right to work.'" (App. A, p. 9).

This Court's decision in Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), was distinguished by the Court of Appeals on the ground that the arbitration clause in that case provided for arbitration of "all disputes between the parties 'as to the meaning, interpretation and applica-

tion of the provisions of this agreement'" (App. A., p.11, quoting from American Manufacturing Co., supra, 363 U.S. at 565). Here, according to the decision below, the parties excluded from arbitration alleged contract violations which do not rest upon express written provisions. In this connection, the decision below notes that the management rights clause of the agreement reserved to Unocal, "except as abridged by a specific provision of this Agreement . . . all lawful power to manage and control its business and its work force" (App. A, p.8).

Finally, the Court of Appeals considered evidence contained in declarations dealing with bargaining history submitted in support of Unocal's motion for summary judgment. That evidence, as

summarized in the decision below, showed that the Union in earlier negotiations had unsuccessfully proposed language which would have expanded the scope of the present arbitration clause (App. A., p.14). In addition, there was evidence treated by the court below as "[m]ost important," to the effect that "Unocal never intended to submit disputes concerning physical and medical qualifications of its employees to an arbitration or any other third party." (App. A., p.15).

Judge Pregerson, dissenting, concluded that the present case cannot be distinguished from Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960). According to the dissent, the clause in American Manufacturing which subjected to arbitration any dispute as

to "the meaning, interpretation and application of the provisions of this agreement" is no different in scope than the clause in this case, which submits to arbitration any "bona fide question concerning the interpretation or application of any express provision of this Agreement" (App. A, pp.19-20). As stated by Judge Pregerson, "the phrase 'provisions of this agreement,' as used in American Manufacturing Co., clearly refers to an express agreement" (App. A, pp.19-20). Referring to the majority's reliance on bargaining history, Judge Pregerson states that the Union's lack of success in expanding the language of the arbitration clause "does not compel the conclusion that Union Oil has succeeded in contracting for control over all employee medical decisions, no matter

what union-negotiated rights are lost" (App. A., p.21).

ARGUMENT

The decision below constitutes an unwarranted departure from principles established by this Court in the "Steelworkers Trilogy,"[2] as reaffirmed in AT&T Technologies Inc. v. Communications Workers, 475 U.S. 643 (1986), and should be reversed summarily.

1. Contrary to the decision below, the arbitrability question presented in this case is to be resolved by a straightforward application of the principles stated in Steelworkers v.

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[2]United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

American Manufacturing Co., 363 U.S. 564 (1960). There, as here, the employer declined to arbitrate a dispute as to whether it had violated the seniority clause of an agreement by refusing to reinstate an employee on the ground that he was physically disabled. The arbitration clause in American Manufacturing differed from the clause in the present agreement only in that it provided that disputes "as to the meaning, interpretation and application" of the agreement were to be arbitrated (363 U.S. at 565), whereas the clause in the present case subjects to arbitration any "bona fide question concerning the interpretation or application of any express provision of this Agreement" (App.C., p.). The seniority clause in American Manufacturing was described by this Court as "a

specific provision of the contract," which required "that the employer will employ and promote employees on the principle of seniority", subject to qualifications not material here. 363 U.S. at 565-566. The seniority clause in the present case is an "express" provision which serves precisely the same function. See App.C, pp.1-7. In each case a dispute existed with respect to the "interpretation or application" of "one or more of the written provisions of [the] Agreement" (App. C., pp. 13, 18); accordingly, in the present case "[a]rbitration should have been ordered." 363 U.S. at 569.

Inquiry into the merits of a dispute for the purpose of determining its abitrability is inappropriate. As recently explained in AT&T Technologies v. Communications Workers, 475 U.S. 643, 649-650 (1986):

> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule

> on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. 'The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.' American Mfg. Co., 363 U.S. at 568.

The court below has not complied with the foregoing admonition in approaching the question of arbitrability in this case. Indeed, it has inquired into the merits of the seniority dispute as a predicate to its conclusion that the dispute is not arbitrable. Thus, the Court of Appeals

has viewed the issue in this case as turning on the absence in the agreement of a provision expressly dealing with the right of employees to return to work after disability. The decision points out, in addition, that Unocal could not have violated the seniority provisions of the agreement since Simon continued "to accrue seniority" during his enforced leave status (App. A., p.9). To bolster its position, the court below also relies on the "management rights" clause in the agreement, which reserves to Unocal "all lawful power to manage and control its business and its work force," and excludes from arbitration such "management rights which are not abridged by a specific provisions of this Agreement . . ." (App. A., p.8). These considerations are typical of those which this Court has

rejected as unreliable and illegitimate indicia of arbitrability. As stated in Steelworkers v. Warrior Navigation Co., 363 U.S. 574, 584 (1960), "if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not [under a management rights clause], the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provisions of the agreement."

In short, the court below has read the limiting words in the arbitration provision in the agreement, which subject to arbitration alleged violations of "express terms or provisions", or violations of "duties or obligations expressed in one or more of the written provisions"

to require, as a prerequisite to arbitration in this case, contract language addressed specifically to disputes concerning the return to work of employees on disability leave. This reading has led the court below to a consideration of factors which, in the court's view, demonstrate that the agreement vests Unocal with unfettered authority concerning the validity of a medical release. Manifestly, these are matters germane to a resolution of the merits of the dispute. The Union's contention on the merits is that the seniority provisions of the agreement mean that employment must be offered to an employee upon a release to return to work following disability to the extent his seniority so entitles him. It is scarcely frivolous, even though that is not the criterion, to

assert that the function of a seniority clause in the circumstances of this case is to determine the right to work. See American Manufacturing Co., supra, at p. pp.565-566. The correctness of the Union's position, however, is not for judicial evaluation. As the Steelworkers Trilogy specifies, the court below exceeded its authority in searching the agreement for language relevant to the merits of the dispute. Arbitration should have been ordered once it is determined that the parties are in dispute as to the interpretation and application of the seniority provisions, which of course are express, written provisions of the agreement.

2. The force of the foregoing considerations is not lessened by evidence of bargaining history upon which

the court below relies. That evidence, contained in a declaration of Unocal's negotiator, is to the effect that (1) the restrictive language in the present agreement has been unchanged since 1971, when the initial agreement between the parties was executed; (2) Union efforts "to expand the grievance procedure" in subsequent negotiations were rejected by Unocal; (3) in 1980 bargaining Unocal rejected a Union proposal to have medical release disputes resolved by a third physician when the employer's and grievant's doctors disagreed, and (4) Unocal at all times during its collective bargaining relationship with the Union wanted "to ensure that it and it alone has the right to determine whether an employee is physically and/or medically

qualified to perform a particular job (App. A, pp.14-16).

All of this is at best equivocal, and much is not material to the question of arbitrability. For example, Unocal's intention to control reinstatement of disabled employees, which incidentally was not asserted in the declaration to have been disclosed to the Union's representatives, relates to the merits of the dispute, not to arbitrability. Unocal's rejection of an innovative procedure to resolve disputes concerning medical releases through a third doctor scarcely proves that such disputes would not otherwise be subject to resolution in arbitration. Finally, rejection of Union proposals to introduce more expansive arbitration language into the agreement does not provide much assistance in

determining whether medical release disputes are arbitrable under the pre-existing contract language; indeed, for all that is known the Union's proposals may have been for clarification only.

The standard by which evidence of this nature is to be weighed is stated in AT&T Technologies v. Communications Workers, 475 U.S. 643, 650 (1986):

> [I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' Warrior & Gulf, 363 U.S. at 582-583, 4 L Ed. 2d 1409, 80 S.Ct. 1347.

Nothing in bargaining history in the present case satisfies this standard for denial of arbitration.

3. The availability of arbitration to resolve industrial disputes arising under collective bargaining agreements is of utmost importance to the implementation of federal labor policy. The principles which this Court has established in promoting arbitration are neither new, nor do they need reaffirmation at this time. See AT&T Technologies v. Communications Workers, 475 U.S. 643, 648 (1986). The continued and uniform application of those principles under the supervision of this Court, however, is essential if arbitration is in fact to enjoy the favored position in dispute resolutions which the decisions of this Court have articulated. The decision below reflects

a failure to grasp and apply those principles. Contrary to the view of the majority of the Court of Appeals, the availability of arbitration does not turn on the difference between a contract clause which calls for arbitration of questions concerning the interpretation or application of the agreement's provisions (See Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), and one which provides for arbitration of questions "concerning the interpretation or application of any express provision of this Agreement" (App. C, p.13). Since the error of the decision below is plain, and because there is no general need for the Court to restate the rules to which it has adhered since the Steelworkers Trilogy decisions in 1960, it is suggested that this is an

appropriate occasion for reversing the decision below without further proceedings.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted, and further that the decision of the Court of Appeals should be reversed summarily.

November, 1988.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TEAMSTERS LOCAL 315, *Plaintiff-Appellee,* v. UNION OIL COMPANY OF CALIFORNIA, *Defendant-Appellant.*	No. 87-2449 D.C. No. CV-87-2173-EFL OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
May 11, 1988—San Francisco, California

Filed September 2, 1988

Before: Harry Pregerson, Robert Boochever and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Dissent by Judge Pregerson

SUMMARY

Labor

The court reversed the district court's grant of summary judgment, holding that the underlying dispute is not arbitrable under the terms of the collective-bargaining agreement.

The district court granted Teamsters Local 315's (Union) motion for summary judgment compelling Union Oil Com-

pany of California (Unocal) to arbitrate a dispute concerning the medical fitness of an employee who had seniority but was not allowed to return to work. Unocal appealed, contending it did not agree to submit its authority to determine the medical qualification of its workforce to arbitration.

[1] The court determined that the terms of the collective-bargaining agreement made clear that arbitration is properly invoked only when Unocal allegedly violated an express written provision, which, in this agreement, is silent with respect to the right of employees to return to work after disability. [2] Rejecting the Union's argument, the court further determined that the agreement's seniority provisions contained nothing about disputes over the medical fitness of an employee to return to work. [3] In reviewing the bargaining history of the parties, the court noted that the strict arbitration clause had been negotiated by Unocal. [4] The bargaining history also demonstrated that Unocal never intended to submit disputes concerning physical and medical qualifications of its employees to an arbitrtor. [5] Such bargaining history constituted forceful evidence that Unocal neither intended to broaden the agreement's strict arbitration clause, nor intended to abrogate its authority to determine the medical fitness of its workforce.

Judge Pregerson dissented, arguing that arbitration was not precluded by the language of the agreement, because the employee had been denied an important consequence of seniority, the right to earn a living.

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OPINION

BEEZER, Circuit Judge:

Union Oil Company of California (Unocal) appeals the district court's grant of summary judgment in favor of Teamsters Local 315 (Union) compelling Unocal to arbitrate a dispute concerning the medical fitness of an employee who was not allowed to return to work. We reverse.

FACTS

Unocal and the Union are parties to a collective-bargaining agreement that provides for arbitration of grievances. This agreement contains strict limitations on the scope of arbitrable disputes. The Union seeks to compel arbitration of a dispute arising out of Unocal's refusal to return an employee, Norman Simon, to work after a medical leave. Simon suffered an industrial injury and was unable to return to work. He received sick-pay allowance in accordance with the collective-bargaining agreement until May 1986 when all available benefits credited to him were used.

Simon's physician cleared him to return to work. Upon review of the employee's job responsibilities, however, Unocal's physician determined that Simon was not medically qualified to perform his job. Pursuant to its physician's recommendation, Unocal refused to allow Simon to return to work. Nonetheless, he remained employed by Unocal, albeit an inactive employee, and continued to accrue seniority pursuant to Article III of the agreement. The Union filed a grievance alleging that Unocal's refusal to return Simon to work

violated the agreement's seniority provisions, although the seniority provisions do not specifically refer to disputes involving the physical fitness of employees to work. Unocal refused to arbitrate the issue since Simon was still an employee and continued to accrue seniority. Moreover, it contended that its decision that Simon was not medically qualified to return to work was a management decision not specifically abridged by the collective-bargaining agreement.

The Union filed a petition to compel arbitration in California Superior Court. Unocal removed the case to federal district court. After cross-motions for summary judgment and a hearing, the district court granted the Union's motion for summary judgment compelling Unocal to arbitrate the underlying dispute. Recognizing that the collective-bargaining agreement allowed arbitration only for express violations, the court formulated the issue before it as "whether the Union has made a bona fide allegation that Unocal's actions violated the seniority provisions of the collective bargaining agreement." The court admitted that the question was a "close one."

Relying on *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), the district court concluded that "the instant dispute falls within the scope of the arbitration clause, and is one which the parties have agreed to arbitrate." The district court conceded that the arbitration provision in *American Mfg. Co.* was broader than the arbitration clause in the present case and that "at first blush it does not appear that disputes involving returning an employee to work would fall within the purview of the seniority provisions of the collective bargaining agreement." Nonetheless, the court reasoned that "the [*American Mfg. Co.*] Court implied that a dispute which is nearly identical to the instant dispute between the Union and the employer falls within the coverage of a seniority provision containing terms which are nearly identical to those contained in the collective bargaining agreement between the Union and Unocal." The court accordingly

granted the Union's motion for summary judgment "because doubts should be resolved in favor of arbitrability." Unocal timely appeals.

ANALYSIS

A grant of summary judgment is reviewed *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). The issue before us is whether the underlying dispute — whether Simon is medically fit to return to work — is arbitrable under the terms of the collective-bargaining agreement.

In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), the Supreme Court outlined important principles from the *Steelworkers Trilogy*[1] governing petitions to compel arbitration under collective-bargaining agreements. The first principle is that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.' " *Id.* at 648 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The duty to arbitrate depends solely on the parties' contractual agreement to settle certain type of disputes by arbitration. *See Francesco's B., Inc. v. Hotel & Restaurant Employees*, 659 F.2d 1383, 1387 (9th Cir. 1981). We must thus determine whether the resisting party has, in fact, agreed by contract to submit the dispute to the arbitration process. *Id.*

The second principle is that the question of arbitrability, *i.e.*, whether the collective-bargaining agreement creates a duty to arbitrate a particular grievance, is an issue for the court to decide, not the arbitrator. *AT&T*, 475 U.S. at 649.

[1] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprises Wheel & Car Corp.*, 363 U.S. 593 (1960).

Another principle set forth by the Supreme Court is that if a contract contains an arbitration clause,

> there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Id. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83). The Court reasoned further that this presumption of arbitrability was particularly applicable where the arbitration clause was as broad as the one before it, which provided for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." *AT&T*, 475 U.S. at 650. With such broad arbitration clauses, the Court continued, " '[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* (quoting *Warrior & Gulf*, 363 U.S. at 584-85).[2]

In the instant case, Unocal argues that the strict arbitration clause and other express provisions in the collective-bargaining agreement, as well as the bargaining history, provide forceful evidence that it never intended to submit the medical qualifications of employees to arbitration. Because the Union has failed to allege a violation of an express provision of the agreement, Unocal concludes, arbitration may not properly be compelled.

The Union responds that the underlying grievance is

[2]A fourth principle outlined by the *AT&T* Court is that in deciding whether a particular grievance is arbitrable, a court is not to rule on the potential merits of the underlying claims. 475 U.S. at 649.

within the scope of the agreement's grievance and arbitration provisions. In particular, the Union maintains that Unocal's refusal to allow the employee to return to work violates the agreement's seniority provisions. The Union reasons further that the absence of language in the agreement referring to the right of an employee to return to work after a disability does not remove the grievance from the scope of the arbitration procedures. In addition, it maintains that the bargaining history does not establish that the underlying grievance is outside the scope of the grievance and arbitration provisions of the agreement.

A. *Express Language of the Collective-Bargaining Agreement*

Because arbitration is a matter of contract, we must ascertain whether the parties have agreed by contract to submit the underlying dispute to the arbitration process. Our first inquiry is into the language of the agreement. The contract language has remained virtually unchanged since the inception of the bargaining relationship in 1971.

Article IX of the collective-bargaining agreement sets forth the procedures for grievance and arbitration. The opening paragraph states: "Any employee or group of employees with their Union representative if so desired shall have the right to present grievances which allege violations of any of the *express terms or provisions* of this Agreement .... The subjects of general rates of pay, general hours of work and *general working conditions* shall *not* be proper subjects for grievances hereunder." *Articles of Agreement*, Art. IX, § A [hereinafter, *Agreement*] (emphasis added). Procedures are provided "[t]o arbitrate a grievance which raises a *bona fide* question concerning the interpretation or application of any *express provision* of this Agreement." *Agreement*, Art. IX, § D (emphasis added).

The most specific limitation on the scope of arbitrable disputes is found in Article IX, § E, ¶ 3: "*Only* actions of the

Company which are alleged to be violations of duties or obligations *expressed in one or more of the written provisions* of this Agreement shall be subject to the grievance and arbitration procedure." (Emphasis added). This strict restriction on arbitration is quite different than the sweeping terms of most broad, "standard form" arbitration clauses that allow arbitration of all disputes between the parties as to the meaning, interpretation, and application of an agreement's provisions. *See, e.g., AT&T,* 475 U.S. at 650; *American Mfg. Co.,* 363 U.S. at 565; *United Food and Commercial Workers Union v. Lucky Stores, Inc.,* 806 F.2d 1385, 1386 (9th Cir. 1986); *Haig Berberian, Inc. v. Cannery Warehousemen,* 535 F.2d 496, 498 (9th Cir. 1976).

The management rights clause is likewise severely narrow in what matters may properly be subject to arbitration:

> It is understood and agreed upon by the Union that, *except as abridged by a specific provision of this Agreement,* the Company reserves and retains the right to exercise solely and exclusively, *all lawful power* to *manage and control* its business *and its work force* . . . . The exercise of all lawful management rights *which are not abridged by a specific provision* of this Agreement shall *not* be subject to arbitration under Article IX above.

Agreement, Art. XXII, § B (emphasis added). This clause exempts from arbitration management decisions that are made pursuant to its unabridged authority. Further limitations to the agreement are found in Article XXII: "The *express provisions* of this Agreement shall be the *sole source* of any rights which may be asserted against the Company in arbitration under Article IX above." *Agreement,* Art. XXII, § A (emphasis added). To submit the underlying dispute to arbitration, the Union must properly allege a violation of a specific provision in the agreement.

[1] The collective-bargaining agreement contains no language that abrogates or abridges Unocal's authority over managing its workforce in terms of deciding whether a given employee is physically and medically fit to return to work. Nor does the agreement specifically make such a determination subject to arbitration. The terms of the agreement make clear that arbitration is properly invoked only when Unocal allegedly violates an express written provision. In its brief, the Union concedes that "the Agreement is silent with respect to the right of employees to return to work after disability." Indeed, the language of the contract taken as a whole demonstrates that Unocal retains such authority. *See Agreement*, Art. XXII, § B (reserving and retaining the right to "manage and control . . . its work force"); Art. IX, § A (stating that the subject of "general working conditions shall not be proper subject[ ] for grievances").[3] In its entirety, the arbitration provisions here are clearly far more limited than in standard form clauses.

Aware that it must allege a violation of an express provision of the collective-bargaining agreement, the Union contends that Unocal has violated the employee's seniority rights under Article III of the contract by not reinstating the disabled employee. This contention, however, is conclusory and thus insufficient to allege the existence of an arbitrable controversy. The Union fails to allege how Simon's express seniority rights under the agreement have been violated. Indeed, the Union concedes in its brief and petition to compel arbitration that Simon *continues to accrue seniority*. Accordingly, the Union's allegation of a violation of Article

[3]Other provisions reinforce Unocal's unwillingness to abandon its authority over the medical qualifications of its workforce. *See, e.g., Agreement*, Art. XVI, § A (stating the payment of sick pay allowance will cease "[w]hen the employee returns to work or is released by a doctor to return to work and subject to verification by a physician designated by the Company"); Art. XVI, § K (stating that "sick pay allowances must be supported by proper medical evidence as required by the Company and are subject to verification by the Company").

III without supporting facts that would support such a violation is merely conclusory.

[2] The agreement's seniority provisions in Article III contain nothing about disputes over the medical fitness of an employee to return to work.[4] Given the express language of the agreement and the Union's acknowledgment that Simon's seniority continues to accrue, the Union fails to make out a violation of an express provision.

In its brief, the Union attempts to circumvent the express language of the seniority provisions by alleging violation of an implied term of Article III:

> The Union's position is that the seniority provisions entitle able bodied employees to work, and that the Company deprives an employee of seniority rights by unilaterally determining the employee is unfit to work. The fact that an employee continues to accrue seniority while disabled does not, in the Union's view, mean that an able bodied employee who is refused the right to work has received all benefits of the Seniority provisions. Indeed, in the Union's view, the employee has been deprived of the most important consequence of seniority — the right to earn a living.

Because arbitration is a matter of contract and the agreement

[4]Under Article III, which defines seniority rights, employees accrue Company Seniority, Terminal Seniority, and Job Classification Seniority. Company Seniority is used to determine eligibility for vacations, holidays, sick pay, and other fringe benefits. Terminal Seniority is used to determine transfers and promotions. Job Classification Seniority is used to determine reduction in staffing. Seniority is broken by (1) resignation; (2) discharge for cause; (3) failure to return to work within seven days after being recalled from layoff; (4) failure to return to work at the expiration of a leave of absence; and (5) any layoff that exceeds twelve consecutive months. None of these contractually-based methods for breaking seniority had occurred.

here only allows arbitration violations of express written provisions, the Union's argument fails. As it concedes, the seniority provisions of the collective-bargaining agreement contain nothing regarding an implied "right to work." The strict limitations in the arbitration provisions plainly indicate that Unocal never acceded to arbitration of implied terms. Allowing arbitration of any implied contractual terms would violate the specific limits of the agreement. Accordingly, the Union fails to demonstrate exactly how Simon's seniority provisions were violated pursuant to the express provisions of the agreement.

The Union draws our attention to *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), maintaining that it is controlling here. Although similar at first blush, *American Mfg. Co.* contains a crucial distinction that distinguishes it from the case at hand. In *American Mfg. Co.*, an employee left work due to an injury and while off work brought an action for compensation benefits. The case was settled, with the employee's physician expressing the opinion that the employee was 25% "permanently partially disabled." The union later filed a grievance that charged that the employee was entitled to return to his job because of the seniority provision of the collective-bargaining agreement. The company refused to arbitrate and the union sought to compel arbitration. The company argued, *inter alia*, that this type of dispute was not arbitrable under the collective-bargaining agreement.

In stark contrast to the instant case, the collective-bargaining agreement in *American Mfg. Co.* contained a "standard form" arbitration clause that provided for arbitration of "all disputes between the parties 'as to the meaning, interpretation and application of the provisions of this agreement.' " *Id.* at 565. The agreement also contained a provision that the company would employ and promote employees on the principle of seniority. *Id.* at 565-66.[5]

[5]In its opening brief, Unocal is overzealous in its characterization of its seniority provisions. It stated: "[T]he parties' agreement is *utterly devoid* of

The Court reasoned that:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitration. It is confined to ascertaining *whether the party seeking arbitration is making a claim which on its face is governed by the contract.*

Id. at 567-68 (emphasis added). In considering the arbitrability issue, the Supreme Court observed that the union claimed that the company had violated a specific provision of the contract, whereas the company maintained it had not violated the clause. *Id.* at 569. The Court concluded that

> there was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

Id.

A crucial distinction between *American Mfg. Co.* and the instant case is the breadth and scope of the arbitration provisions. Unlike the standard form arbitration clause in *American Mfg. Co.*, the agreement between the Union and Unocal strictly limits arbitration to "[o]nly actions of the

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any procedures governing promotion — in the seniority clause or any where else." (Emphasis in original). However, the seniority clause provides: "Promotions shall be made on the basis of qualifications and Terminal Seniority." *Agreement*, Art. III, § A, ¶ 2.

Company which are alleged to be violation of duties or obligations expressed in one or more of the written provisions of this Agreement." *Agreement*, Art. IX, § E, ¶ 3. Moreover, as discussed *supra*, Unocal has expressly reserved its unabridged authority to manage its workforce. The Union maintains that the scope of the grievance procedures here and in *American Mfg. Co.* are similar, drawing this panel's attention to other provisions in the agreement. *E.g., Agreement*, Art. IX, § A (stating that "any employee . . . shall have the right to present grievances which allege violations of any of the express terms of this Agreement"); Art. IX, § D (providing arbitration procedures "[t]o arbitrate a grievance which raises a bona fide question concerning the interpretation or application of any express provisions of this Agreement."). However, reading the agreement as a whole, as discussed *supra*, compels the conclusion that the arbitration provisions here are far more limited than the standard form clause in *American Mfg. Co.* Because of the strict arbitration provisions expressly set forth in the agreement, *American Mfg. Co.* is distinguishable. Arbitration is a matter of contract; we may not simply apply the teaching of *American Mfg. Co.* without construing the agreement entered into between the Union and Unocal. *See Teamsters Union Local 287 v. Frito-Lay, Inc.*, No. 87-2250, slip op. at 7224-26 (9th Cir. June 16, 1988) (construing in favor of arbitrability a standard form clause). In this agreement, the parties bargained for and adopted extremely restrictive arbitration provisions. We are bound to give effect to these strict provisions.

B. *Bargaining History*

Our second inquiry is into the bargaining history between the parties. We have reasoned that "[t]he very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretations." *Communications Workers of America v. Pacific N.W. Bell Telephone Co.*, 337 F.2d 455, 459 (9th Cir. 1964) (footnotes omitted); *see also American Mfg. Co.*, 363

U.S. at 570 (Brennan, J., concurring) (stating that "[w]ords in a collective bargaining agreement . . . are to be understood only by referent to the background which gave rise to their inclusion"); *Syufy Enters. v. Northern Calif. State Ass'n of IATSE Locals*, 631 F.2d 124, 126 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) (stating that "it is proper for courts to consider evidence of the intent of the parties, particularly bargaining history, in determining the scope of arbitration clauses").

[3] An examination of the bargaining history reveals that the Union has attempted to modify the strict arbitration clauses during negotiations. Barlow H. Thompson, Unocal's General Manager of Human Resources in the Refining & Marketing Division, participated in the negotiations for all six collective-bargaining agreements entered into between the Union and Unocal since 1971. In his Declaration, Thompson states:

> While other employers who have collective bargaining agreements might be willing to allow "any question concerning the interpretation of the agreement" to be submitted to an arbitration, [Unocal] was (and has remained) adamantly opposed to such a provision. Thus, it bargained for and obtained several restrictions on the types of disputes that could be submitted to the grievance and arbitration procedure.

During negotiations for the first agreement in 1971, Unocal bargained for and obtained the present strict arbitration clause. According to Thompson, during the subsequent negotiations in 1974, the Union attempted to expand the grievance procedure and allow more types of disputes to be grievable. Such attempt was rejected and the grievance and arbitration procedure remained the same.

In the 1977 negotiations, Thompson states that the Union proposed a major modification to the limitation in Art. IX,

§ E, ¶ 3, namely, allowing any question concerning the interpretation of the contract to be grievable. Unocal rejected the Union's proposal. The Union dropped the demand and paragraph 3 continued to contain a strict limitation: only actions of the Company alleged to be violations of express provisions of the contract are subject to the grievance and arbitration procedure.

[4] Most important, the bargaining history between the parties demonstrate that Unocal never intended to submit disputes concerning physical and medical qualifications of its employees to an arbitrator or any other third party. According to Thompson's Declaration:

> The Company wants to ensure that it and it alone has the right to determine whether an employee is physically and/or medically qualified to perform a particular job. The reason for this is that, because it is the Company that is ultimately responsible for the consequences of having an employee do a job when he is not physically qualified to do it, it should be the Company that decides when that employee is physically and/or medically qualified to do the job.

The management rights clause served in part to insure this authority to "exercise, solely and exclusively, all lawful power to manage . . . its work forces." That clause stated: "The exercise of all lawful management rights which are not abridged by a *specific provision* of this Agreement shall not be subject to arbitration under Article IX above." *Agreement*, Art. XXII, § B (emphasis added). At no time during the bargaining history has there been a specific provision adopted that has abridged or limited Unocal's authority to determine the medical fitness of an employee to return to work.

During the 1980 negotiations, the Union proposed the following limit on Unocal's ability to determine the medical qualifications of its workforce:

> If a report of a Company appointed physician adversely affects the employment status of a permanent employee, such employee may have a physician of his own selection conduct a second examination. A copy of this report is to be furnished to the Company.
>
> If the Company's physician and the employee's physician disagree, they shall select an independent third physician who is expert in the ailment being considered.
>
> If the third physician considers the original report to be erroneous, any action taken by the Company therefrom, shall be revoked.
>
> The fee of the third physician will be shared equally by the employee and the Company.

Unocal rejected the proposal.

[5] The bargaining history between the Union and Unocal demonstrates that Unocal bargained for and obtained strict arbitration clauses and abridgment of its management rights only by specific provisions. Such bargaining history constitutes forceful evidence that Unocal neither intended to broaden the agreement's strict arbitration clause, nor intended to abrogate its authority to determine the medical fitness of its workforce.

CONCLUSION

We have acknowledged that the Supreme Court has "adopted presumption of arbitrability as a rule of construction for collective bargaining agreements." *Associated Plumbing & Mechanical Contractors of Sacramento, Inc. v. Local Union No. 447*, 811 F.2d 480, 481 (9th Cir. 1987). The Supreme Court has reasoned that an order to arbitrate a spe-

cific dispute should not be denied " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *AT&T*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83).

Nonetheless, this case involves a far more limited collective-bargaining agreement than is found in typical labor contracts. The strict and narrow terms of the collective-bargaining agreement and the parties' bargaining history constitute " 'forceful evidence of a purpose to exclude the claim from arbitration.' " *AT&T*, 475 U.S. 650 (quoting *Warrior & Gulf*, 363 U.S. at 585). Such forceful evidence rebuts the presumption of arbitrability and demonstrates that Unocal did not agree to submit its authority to determine the medical qualification of its workforce to arbitration.[6]

Unocal cannot be required to submit to arbitration the underlying dispute — whether Simon is medically fit to return to work — when it has not agreed to so submit. *See AT&T*, 475 U.S. 648; *Warrior & Gulf*, 363 U.S. at 582. Unocal was careful to bargain for and obtain extremely limited arbitration provisions in which it did not surrender any of its authority to manage its workforce. As we have reasoned when reviewing a very broad and sweeping arbitration clause:

> [The company] was free to negotiate an arbitration provision as broad or narrow as it wished "for there is no compulsion in law requiring [it] to include any such promises in its agreement." Wise or not, a deal is a deal. "[C]ourts cannot make for the parties bet-

[6]We note that the *AT&T* Court reasoned that such forceful evidence rebutting the presumption of arbitrability is required where the arbitration claim is as broad as the one then before it, which provided arbitration of " 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder.' " 475 U.S. at 650. As discussed *supra*, the arbitration provisions here are in stark contrast to such sweeping "standard form" arbitration clauses.

> ter agreements than they themselves have been satisfied to make."

Lucky Stores, 806 F.2d at 1386 (citations omitted); *see also American Mfg. Co.*, 363 U.S. at 570 (Brennan, J., concurring) (stating that "[t]he parties are free to make [the promise to arbitrate] as broad or as narrow as they wish"). Here, the parties freely entered into a contract that provided an extremely strict arbitration clause. If the Union wants a broader arbitration provision, its arguments are better directed to the next time the collective-bargaining agreement is negotiated. *See Lucky Stores*, 806 F.2d at 1386. As the strict language stands now, Unocal has not agreed to submit the medical and physical qualifications of its employees to arbitration.

With regard to the Union's reliance on *American Mfg. Co.*, we conclude that a complete review of its facts and rationale demonstrates that it is distinguishable due to its sweeping "standard form" arbitration clause. Because arbitration is a matter of contract, we must construe the agreement entered into between the parties in light of the bargaining history.

Accordingly, we reverse and remand to the district court with directions to enter summary judgment for Unocal.

REVERSED.

PREGERSON, J., Dissenting:

I respectfully dissent. Norman Simon, a member of Teamsters Local 315, suffered an industrial injury that prevented him from working. After a period of recuperation, Simon was cleared to return to work by his physician. But Union Oil's physician decided that Simon was not medically capable of performing his old job. Accordingly, Union Oil refused to reemploy Simon. However, Union Oil kept Simon on as an

inactive employee—without pay—by allowing him to continue accruing seniority under Article III of the collective bargaining agreement.

Because Union Oil used the seniority status tactic to keep Simon "employed," Local 315's dispute involves more than a medical decision regarding Simon's ability to perform his old job. The dispute also involves the interpretation of the seniority provision of the collective agreement. Local 315 asserts

> that the seniority provisions entitle able bodied employees to work, and that the Company deprives an employee of seniority rights by unilaterally determining the employee is unfit to work. The fact that an employee continues to accrue seniority while disabled does not, in the Union's view, mean that an able bodied employee who is refused the right to work has received all benefits of the Seniority provisions. Indeed, in the Union's view, the employee has been deprived of the most important consequence of seniority—the right to earn a living.

Brief for Appellee at 14-15.

Article IX, § D of the collective agreement provides a procedure "[t]o arbitrate a grievance which raises a bona fide question concerning the *interpretation* or *application* of any express provision of [the] Agreement." (Emphasis added.) A bona fide question raised by Local 315 is whether a medically fit employee who continues to accrue seniority can be denied work and a paycheck based on the unilateral decision of the company's physician. The answer to this question requires an interpretation of the extent of benefits that flow from the express seniority provisions of the collective agreement.

In that regard, I fail to see how this case is distinguishable from *United Steelworkers of America v. American Manufac-*

turing Co., 363 U.S. 564 (1960), one of the original Steelworkers Trilogy cases, which held a similar grievance to be arbitrable. There, as here, the union filed a grievance protesting the employer's refusal to allow a previously injured employee to return to work after he had been released to return to work by his physician. Further, in *American Manufacturing Co.* the union asserted that the employer's actions violated the seniority provision of the collective agreement. As in the present case, the seniority provision was silent as to a previously injured employee's right to return to work. Nevertheless, the Court held that, because there was "a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement[,] [a]rbitration should have been ordered." *Id.* at 569.

The majority is convinced that there is a substantial difference between the arbitration clause in this case and the clause in *American Manufacturing Co.* However, I believe that the distinction between the two arbitration clauses is inconsequential. In the instant case, the arbitration provision, Art. IX, § A, states: "Any employee or group of employees with their Union representative if so desired shall have the right to present grievances which allege violations of any of the *express terms or provisions of this Agreement* . . . ." (Emphasis added.) The arbitration provision in *American Manufacturing Co.* stated: "[A]ny disputes, misunderstandings, differences or grievances as to the meaning, interpretation and application of the *provisions of this agreement* . . . may be submitted to the Board of Arbitration for decision." *American Mfg. Co.* at 565 n.1 (emphasis added).

I see very little difference between the critical language of the two arbitration provisions. It seems to me that the phrase "provisions of this agreement," as used in *American Manufacturing Co.*, clearly refers to an express agreement.

We have been told that " '[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with

positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.'" *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Local 315's argument that the seniority provision has been violated because Simon has been denied an important consequence of seniority—the right to earn a living—is, to my mind, persuasive, and I cannot say with positive assurance that the arbitration clause at issue precludes the interpretation of the seniority provision advanced by Local 315.

The majority is also persuaded by Union Oil's version of its bargaining history with Local 315. However, the bargaining history indicates merely that Local 315 had not succeeded in negotiating an express provision to allow a third doctor to resolve medical disputes between an employee's physician and the company's physician. This circumstance does not compel the conclusion that Union Oil has succeeded in contracting for control over all employee medical decisions, no matter what union-negotiated rights are lost.

Finally, the management rights clause, on which Union Oil relies, is merely a catch-all for non-bargained rights. It reads,

> *except as abridged by a specific provision* of the Agreement, the Company reserves and retains the right to exercise, solely and exclusively, all lawful power to manage and control its business and its work forces. . . . The exercise of all lawful management *rights which are not abridged by a specific provision* of this Agreement shall not be subject to arbitration under Article IX above.

Agreement, Art. XXII, § B (emphasis added). This clause should be narrowly construed. *Cf. United Steelworkers*, 363 U.S. at 584 (the provision, "matters which are strictly a func-

tion of management shall not be subject to arbitration," refers "only to that over which the contract gives management complete control and unfettered discretion"). The fact that Union Oil, under the collective agreement, retained the right to exercise the power to manage and control its work force does not mean that it may with impunity deny an employee seniority benefits covered by the collective agreement.

The district court concluded that the dispute fell within the arbitration clause after resolving doubts in favor of arbitrability as instructed by the Supreme Court in *American Manufacturing Co.* I would affirm the district court's decision granting Local 315's motion for summary judgment and ordering Union Oil to arbitrate.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TEAMSTERS LOCAL 315, Petitioner, vs. UNION OIL COMPANY OF CALIFORNIA, Respondent.	C-87-2173 EFL ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court pursuant to cross motions for summary judgment filed by Petitioner Teamsters Local 315 (the Union) and Respondent Union Oil Company of California (Unocal). The Court having considered the evidence and argument of the parties, issues the following order:

There is no dispute as to the facts. The Union and Unocal are parties to a collective bargaining agreement which provides for arbitration of grievances. The collective bargaining agreement provides that:

> Only actions of the Company which are alleged to be violations of duties or obligations expressed in one or more of the written provisions of this Agreement shall be subject to the grievance and arbitration procedure.

The Union seeks to compel arbitration of a dispute arising out of the failure of Unocal to return an employee to work after a medical leave. The employee has been cleared to return to work by his doctor, but Unocal's doctor has not cleared the employee to return to work. The Union's grievance alleges that Unocal's refusal to return

the employee to work violates the seniority provisions of the collective bargaining agreement, although the seniority provisions do not specifically refer to disputes involving the physical fitness of employees to work. Unocal asserts that the seniority provisions of the collective bargaining agreement are not applicable to the dispute, and that it has the unilateral right to determine whether an employee is physically fit to work.

In considering the cross motions for summary judgment, the Court is guided by the decisions of the Supreme Court in AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. ___, 89 L.Ed. 2d 648 (1986) and Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In AT&T, supra, the

Supreme Court set forth the standards governing petitions to compel arbitration under collective bargaining agreements:

> [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreement so to submit. (Id., 89 L.Ed. 2d at 655)
>
> [T]he question of arbitrability -- whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination. (Id., 89 L.Ed. 2d at 656)
>
> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. (Id.)

> [T]here is a presumption of arbitrability in the sense that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Id.) (Emphasis added.)

In the collective bargaining agreement, the parties agreed to submit to arbitration all disputes regarding actions of Unocal which are alleged to be violations of the collective bargaining agreement. Therefore, the issue before this Court is whether the Union has made a bona fide allegation that Unocal's actions violated the seniority provisions of the collective bargaining agreement.

The issue presented by the present case is a close one. In the Steelworkers case, the Supreme Court ordered

arbitration of a substantially similar dispute, i.e., a union's claim that an employer violated the seniority provisions of a collective bargaining agreement by failing to return an employee to work based upon the employer's judgment that the employee was not physically fit to return to work. The seniority provision in that case was substantially similar to the one in the present case. As in the present case, the seniority provision in Steelworkers did not specifically address disputes regarding the physical fitness of employees to return to work. Although the arbitration provision in Steelworkers was broader than the arbitration provision in the present case, the Steelworkers Court specifically ruled that "[t]he union claimed in this

case that the company had violated a specific provision of the contract." Steelworkers, 363 U.S. at 569.

Although at first blush it does not appear that disputes involving returning an employee to work would fall within the purview of the seniority provisions of the collective bargaining agreement, the Steelworkers Court implied that a dispute which is nearly identical to the instant dispute between the Union and the employer falls within the coverage of a seniority provision containing terms which are nearly identical to those contained in the collective bargaining agreement between the Union and Unocal. Therefore, the instant dispute falls within the scope of the arbitration clause, and is one which the parties have agreed to arbitrate. Because doubts

should be resolved in favor of arbitrability, the Union's motion for summary judgment is granted, and Unocal's motion for summary judgment is denied. The Union's request for attorney's fees is denied.

IT IS SO ORDERED:

Dated: July 7, 1987.

EUGENE F. LYNCH
United States
District Judge

APPENDIX C

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III
SENIORITY

A. There shall be recognized three (3) types of seniority as set forth below -- Company Seniority, Terminal Seniority and Job Classification Seniority.

1. Company Seniority which will also be known as Company Service.

a. Company Seniority is defined as all service with the company since the employee's service date and will be determined and accumulated in accordance with Company practice.

b. Company Service is used for the purpose of computing and determining

eligibility for vacations, holidays, sick pay and certain other benefits.

c. Vacation Scheduling

Vacations will be scheduled by the Company and employees will be given preference in vacation schedules in accordance with their Terminal Seniority.

2. Terminal Seniority

Terminal Seniority shall be defined as the accumulated service of employees at the Richmond Terminal of the Company.

Subject to the provisions of this Article III, Terminal Seniority shall be used as a basis for transfers, etc. Promotions shall be made on the basis of qualifications and Terminal Seniority.

3. Job Classification Seniority

Job Classification Seniority shall be defined as service within a classification from the first date an employee

permanently enters such classification. The sole criteria to determine the individual or individuals who shall be demoted to accomplish reduction in staffing shall be Job Classification Seniority.

4. n March 1 and September 1 of each year, the Company will provide the Union and shall post updated Job Classification, Terminal, and Company Seniority Lists. The Union and each individual employee shall have six (6) calendar weeks to protest errors in the initial list before it shall become final.

B. LAYOFFS

1. When it becomes necessary to lay off employees for lack of work, employees shall be laid off at the Terminal on the basis that the employee

with the least Terminal Seniority shall be the first to be laid off. It is understood, however, that employees may be laid off out of line of seniority when remaining employees are not qualified to perform the required work.

2. Employees laid off shall be re-employed at the Terminal in reverse order of layoff provided his seniority protection period has not expired.

3. The Company will give the Union advance notice of a reduction of working forces by layoff of employees.

4. When an employee is demoted, he shall return to his previous job classification, in accordance with his Job Classification Seniority rights, provided he is qualified to perform such assignment. If he is not qualified, he will

accept assignment in any classification as an alternative to layoff.

C. TRANSFERS OUTSIDE THE BARGAINING UNIT

Any employee assigned or transferred with his consent to a classification outside the scope of the bargaining unit shall be allowed to accumulate seniority in the bargaining unit during such period. If such assignment is completed within one hundred and eighty (180) days or less, he shall return to the bargaining unit from which he was removed; if such assignment continues beyond one hundred and eighty (180) consecutive days, then the employee will lose prior seniority in the unit, and if and when he is later returned to the unit he shall be assigned to a position in the bargaining unit for which he is qualified and on the basis of his

seniority with no credit for prior Terminal Seniority. This provision shall not apply to those employees who have been disabled and are released to return to work with medical restrictions which may disqualify them from returning to their regular assignment. When such employees who are retained in other employment by the Company are given medical release to return to their regular assignment, they shall be reinstated with full seniority including credit for time working in the Company assignments outside the scope of this bargaining unit.

D. SENIORITY SHALL BE BROKEN BY OCCURRENCE OF ANY OF THE FOLLOWING:

1. Resignation

2. Discharge for cause

3. Failure of an employee to return to work from layoff within seven

(7) days after posting a notice certified mail, return receipt requested, to the address of record in the Company's files.

4. Failure to return to work at the expiration of leave of absence when such failure is unexcused.

5. Any layoff which exceeds twelve (12) consecutive months.

E. DISCHARGE OR DISCIPLINE FOR CAUSE

Discharge or discipline for just cause may be accomplished by the employee's supervisor without further review or approval except that such employee shall have the right to resort to the grievance procedure hereinafter provided. Proceedings under the grievance procedure shall be commenced within seven (7) working days after the date of Company action. Any employee discharged

or disciplined shall be given complete information, in the presence of a Steward, unless the employee indicates otherwise, as to the reason or reasons therefor. In the case of discharge such information shall be provided in writing as soon as possible, with a copy to the Union.

F. PROPRIETARY INTEREST IN EQUIPMENT

No employee as a condition of employment shall be required to assume any proprietary interest in the Company property, facilities, or in any vehicular equipment.

G. When a permanent job vacancy occurs in any job classification listed in Appendix A, except for the compounder, a notice will be posted for a period of fourteen (14) days. Any employee in the bargaining unit may file a written bid.

The job will be awarded to the senior qualified bidder on the basis of their Terminal Seniority. The results will be posted on the Company's bulletin board.

H. The Company shall not later than November 15th of each year at Richmond Terminal post all driving shifts for bid. All bids will be closed when completed but not later than 6:00 p.m., December 15th of each year.

Transport Truck, Transport Van Truck and General Truck Drivers will be assigned schedules for the following year based on job classification seniority and their bids. In the event of openings in any of the shift schedules during the year, that particular shift schedule will be re-bid and assigned based on requirements of this article.

Results of the bids will be posted on the Company's bulletin board.

* * *

ARTICLE VIII
STRIKES AND LOCKOUTS

It is agreed that there shall be no strike or no suspension or slowdown of labor by the employees or lockout by the Employer during the term of this Agreement.

ARTICLE IX
GRIEVANCE AND ARBITRATION

A. Any employee or group of employees with their Union representative if so desired shall have the right to present grievances which allege violations of any of the express terms or provisions of this Agreement. Processing grievances shall not unduly interfere with the continuity and efficiency of operations.

The subjects of general rates of pay, general hours of work and general working conditions shall not be proper subjects for grievances hereunder.

B. Both parties hereto agree to make every practical effort to settle such grievances in the immediate area in which it arises. No loss of time shall be suffered by the employee in handling grievances. Not more than two (2) employees covered by this Agreement shall participate in processing any particular grievance.

C. GRIEVANCE PROCEDURE

Individual grievances shall be settled in accordance with the following procedures:

1. The employee will first seek adjustment of any dispute with the employee's immediate supervisor. If an

agreement is not reached, then the complainant may:

2. Present the written grievance to the Terminal Manager. The written grievance must describe as fully as possible each alleged violation and the underlying circumstances, specifically identify each and every Article of the Agreement allegedly violated and state as clearly as possible the claim or relief sought. The Manager shall arrange a meeting with the complainant within seven (7) calendar days after such grievance is presented and shall furnish the complainant with a written decision within seven (7) calendar days after such meeting, with a copy to the Union by certified mail.

3. If the grievance is not settled in Step 2 above, the Union shall have not

more than seven (7) calendar days after the receipt of said decision in which to make a written request to the Company for arbitration under the procedure hereinafter provided.

D. ARBITRATION PROCEDURE

To arbitrate a grievance which raises a bona fide question concerning the interpretation or application of any express provision of this Agreement and which is not settled under Section B of this Article IX, the following procedure shall be observed.

1. Within seven (7) calendar days after the written request for arbitration, the complainant shall designate one (1) member and the Company shall designate one (1) member of a Board of Arbitration. The arbitrators so selected shall meet and endeavor to resolve the

dispute. They shall have a period of not more than thirty (30) calendar days in which to attempt to resolve it. If they fail or are unable to so resolve it then, upon written notice given by the Union to the Company and to the arbitrators within forty-five (45) calendar days after the request for arbitration was made, the arbitrators shall proceed with the subsequent step of arbitration.

2. Upon written notice being given by the Union of its desire to proceed to the subsequent step of arbitration in accordance with the preceding sentence, the two arbitrators shall thereupon endeavor to select a third (3rd) arbitrator from names supplied by the American Arbitration Association or otherwise. If they are unable to agree on such selection, the third (3rd) arbitrator shall be

selected by the arbitrators by alternatively striking names from a list containing seven (7) names of potentially qualified arbitrators to be supplied by the American Arbitration Association, and the last remaining name shall be the third (3rd) arbitrator. Copies of such list shall be requested by the Union. Such selection shall be completed within sixty (60) calendar days after the request for arbitration.

3. Within thirty (30) calendar days after selection of the third (3rd) arbitrator, the tripartite Board of Arbitration shall meet and consider the dispute. The arbitration shall, at the demand of either party, be conducted under the rules of the American Arbitration Association then obtaining. Within thirty (30) calendar days after the

initial meeting, the Board of arbitration shall issue its decision. The award of the Board of Arbitration shall be in writing and only on the issues submitted to it.

4. The Board's findings shall be final and binding on the parties. The Board of Arbitration shall have the power to interpret this Agreement, but shall not have the power to change modify or add to any of its terms or provisions, or the power to decide a dispute on the basis of practice, apart from the express provisions of this Agreement, unless the parties specifically submit to him the issue of whether or not the Agreement was amended by practice or implication. At least two (2) arbitrators must sign the award in order to constitute it the decision of the Board. The expenses and

compensation of the arbitrator selected by each party shall be borne by such party, and the expense and compensation of the third (3rd) arbitrator shall be shared equally by both parties. The expenses and compensation of any witness call before the Board shall be borne by the party calling such witness.

E. LIMITATIONS

1. Time limitations specified herein shall be applicable unless extended by mutual agreement between the parties.

2. Irrespective of anything else herein contained grievances concerning discharged employees must be presented in writing to such employee's supervisor within seven (7) working days after notification of such discharge is given

to a business representative of the Union.

3. Only actions of the Company which are alleged to be violations of duties or obligations expressed in one or more of the written provisions of this Agreement shall be subject to the grievance and arbitration procedure.

4. Nothing contained in this Article shall prevent any individual employee or group of employees from presenting grievances to the Company and from having such grievances adjusted without the intervention of the Union so long as the adjustment is not inconsistent with the terms of this Agreement. In all such cases a representative of the Union shall be given the opportunity to be present at such adjustment.

F. The Union shall designate Stewards to the Company. One (1) Steward shall be appointed for Truck Drivers; one (1) Steward for warehousing and outside plant operations and three (3) alternate Stewards, who shall function in the absence of both Stewards. The Company will permit a Steward to leave his work for a reasonable amount of time for the purpose of processing and adjusting grievances and the posting of notices. In no instance shall a Steward leave the job without first seeking approval from his immediate supervisor.

Supreme Court, U.S.
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No. 88-915

In The

Supreme Court of the United States

October Term, 1988

TEAMSTERS LOCAL 315,

Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals properly apply the principles enunciated by this Court in *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643 (1986) when it held that the dispute between the parties concerning medical competence of the work force was not arbitrable in light of the strictly circumscribed clauses governing arbitration in the parties' collective bargaining agreement and the undisputed evidence of the parties' collective bargaining history?

LIST PURSUANT TO SUPREME COURT RULES, RULE 28.1

Unocal Corporation

Union Oil Company of California

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No. 88-915

In The

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TEAMSTERS LOCAL 315,

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UNION OIL COMPANY OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Union Oil Company of California respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking reversal of the Ninth Circuit's opinion in this case. That opinion is reported at 856 F.2d 1307 (9th Cir. 1988).

STATEMENT OF THE CASE[1]

I. Relevant Contract Clauses.

Respondent Union Oil Company of California ("Unocal" or "the Company") and Petitioner Teamsters Local 315 ("the Union" or "Local 315") are parties to a collective bargaining agreement which contains severely limited grievance and arbitration provisions. Specifically, Article IX, Section E, paragraph 3 of the contract states:

> Only actions of the Company which are alleged to be violations of duties or obligations *expressed* in one or more of the written provisions of this Agreement shall be subject to the grievance and arbitration procedure. [Emphasis added].

The agreement also contains a management rights clause which further reinforces the narrow scope of the arbitration clause.[2] Article XXII, section B states:

> It is understood and agreed by the Union that, *except as abridged by a specific provision* of this Agreement, the Company reserves and retains the right to exercise, solely and exclusively, all lawful power to manage and control its business and its work forces, and to contract with others for the performance of any required work. The *exercise of all lawful management rights which are not abridged by a specific provision of this Agreement shall not be subject to arbitration* under Article IX above. (App. A, p. 5, emphasis added).

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[1] Respondent is satisfied with Petitioner's statements concerning *Opinions Below, Jurisdiction and Statutory Provisions Involved* (Pet., pp. 2-3). Accordingly, this Brief in Opposition does not repeat that information. *See* Supreme Court Rules, Rule 34.1(d), (e), (f); Rule 34.2.

[2] This clause is set forth in its entirety in Appendix A, *infra*.

II. The Parties' Bargaining History.

Since 1971, the Company and the Union have had a continuous collective bargaining relationship. Commencing with the first labor agreement signed by the parties, the grievance and arbitration provisions have remained virtually unchanged.[3] These provisions differ from "standard form" arbitration clauses found in most other collective bargaining agreements because they provide *strict* limitations on the types of disputes which may be submitted to arbitration. Specifically, the parties' contract always has limited the scope of arbitrable disputes *only* to those which allege violations of duties or obligations *expressed in one or more of the written provisions.*

This narrow limitation on arbitration was drafted intentionally. Though other employers may permit "any question concerning the interpretation of the agreement" to be submitted to an arbitrator, Unocal always has been adamantly opposed to such a provision. Thus, the Company bargained for – and obtained – severe restrictions on the types of disputes that could be submitted to arbitration.

To emphasize its commitment to strictly circumscribe the scope of arbitrable disputes, the Company also negotiated a complementary management rights clause. This clause reserves to the Company the sole and exclusive right to manage its work forces *unless* that right has been

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[3] The grievance and arbitration provisions have been included as Appendix C to the Petition for Writ of Certiorari. Thus, those sections will not be reprinted in Respondent's Brief in Opposition.

abridged by a *specific* provision of the agreement. Furthermore, this clause expressly *exempts* from arbitration, Company decisions rendered pursuant to the management rights clause.

The parties' bargaining history reveals that the Union attempted, on several occasions, to secure a modification of the arbitration clause. During the 1974 negotiations, for example, the Union attempted to expand the grievance procedure. The Company rejected this Union proposal, and the grievance and arbitration provisions remained unchanged. During negotiations for the 1977 contract, the Union again proposed a change in these provisions; it proposed that "any question concerning the interpretation of the contract" be subject to grievance and arbitration. As it had done in 1974, the Company rejected the Union's demand and the arbitration provision remained unchanged.

The parties' collective bargaining history also establishes that the Company always has been committed to retaining its right to determine an employee's physical and medical qualifications to work. For example, this commitment is reflected in the contract provisions governing payment of sick pay allowance which state in relevant part:

> Payment of sick pay allowance will cease . . . when the employee returns to work or is released by a doctor to return to work *and subject to verification by a physician designated by the Company.* (App. A, p. 3, emphasis added).[4]

---

[4] Article XVI of the agreement governing sick pay is set forth in its entirety in Appendix A, *infra.*

The intent of the Company to unilaterally decide the physical and medical competence of its employees is further reflected in the stance Unocal has taken during labor negotiations for the past 17 years. For example, during the 1980 negotiations, an issue arose regarding the use of a third physician to resolve disputes over medical qualifications of employees. During those negotiations, the Union proposed that the following language be added to the contract:

> If a report of a Company appointed physician adversely affects the employment status of a permanent employee, such employee may have a physician of his selection conduct a second examination. . . .
>
> If the Company's physician and the employee's physician disagree, they shall select an independent third physician who is expert in the ailment being considered.
>
> If the third physician considers the original report to be erroneous, any action taken by the Company therefrom shall be revoked.

In accordance with its commitment not to abrogate its right to determine the medical competence of employees, the Company rejected this Union proposal. The Union dropped this issue.

III. The Underlying Grievance.

The dispute in the underlying case concerns whether an employee, Norman Simon, is medically competent to return to work. Simon was injured on the job and, as a result, was unable to work. Thus, Simon received sick pay allowance in accordance with Article XVI of the contract until all available benefits had been exhausted.

However, regardless of the cessation of sick pay benefits, Simon remains employed by the Company and continues to accrue seniority in accordance with Article III of the parties' agreement.[5]

Simon's physician believes that Simon is capable of returning to work. Nevertheless, upon review of Simon's job responsibilities, the Company physician has determined that Simon cannot safely perform his duties. Therefore, acting on the recommendation of its physician, Unocal has refused to reinstate Simon.

Simon filed a grievance over this management decision. The Union then corresponded with the Company, informing it that Local 315 considered Simon's grievance to be arbitrable on the ground that unwarranted refusal to reinstate Simon jeopardized his seniority under Article III. However, the Union never specified how Simon's seniority was being threatened. Alternatively, the Union proposed that Simon's condition be evaluated by a third physician whose opinion would be binding on the parties. Consistent with its stated position on the right to determine medical competence, the Company rejected this proposal.

The Company also advised the Union that it would not arbitrate Simon's grievance because the decision not to reinstate Simon was a management decision rendered pursuant to the management rights clause of the contract. Therefore, this management decision was outside the scope of the arbitration provision of Article IX.

---

[5] The Union admitted this fact throughout the proceedings below.

The Union moved to compel arbitration in California Superior Court. The Company removed the case to the United States District Court for the Northern District of California and moved for summary judgment on the ground that the collective bargaining agreement and bargaining history established the parties' lack of intent to submit to arbitration disputes concerning the medical qualifications of the work force. The Union filed a cross-motion for summary judgment.

On July 8, 1987, the district court granted the Union's motion compelling the Company to arbitrate the underlying dispute. The Company appealed that judgment to the Ninth Circuit Court of Appeals. On September 2, 1988, the court below filed its opinion and held that the strict, narrow terms of the collective bargaining agreement, and the parties' bargaining history, established that the parties did not intend to arbitrate disputes concerning the medical competence of the work force.

REASONS FOR DENYING THE WRIT

I. A Writ Of Certiorari Should Not Issue Merely To Review Evidence And The Parties' Different Views Of Their Factual Positions.

The granting of a writ of certiorari is discretionary and depends on several factors other than the perceived correctness of the decision below. *Superintendent v. Hill*, 472 U.S. 445, 460 (1985), citing *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). Moreover, "the merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound

administration of this Court's discretionary docket." *Superintendent v. Hill*, 472 U.S. at 460, n.4, quoting *Ponte v. Real*, 471 U.S. 491, 501-502 (1985) (Stevens, J., concurring). Finally, this Court "[does] not grant a certiorari to review evidence and discuss specific facts." *Superintendent v. Hill*, 472 U.S. at 460-461, quoting *United States v. Johnson*, 268 U.S. 220, 227 (1925).

Petitioner advises this Court that granting certiorari is necessary to remedy the Ninth Circuit's "unwarranted departure" from well-established precedent in the field of labor arbitration. (pet., p. 15). Respondent, however, respectfully submits that Petitioner has done nothing more than voice its dissatisfaction with the result in the court below. Moreover, as discussed, *infra*, the Ninth Circuit properly applied long-standing principles governing the arbitrability of disputes to reach its conclusion that the parties' dispute is outside the scope of the arbitration provisions of the collective bargaining agreement. Therefore, Respondent contends that the Ninth Circuit's decision is correct. As such, the petition should be denied.

II. The Decision Below Is Correct Because The Ninth Circuit Properly Applied The Principles Set Forth In This Court's Decisions Governing Labor Arbitration.

The Union's primary contention in support of its petition for writ of certiorari is that the court below erred by reviewing the parties' labor agreement to locate language relevant to the merits of the underlying dispute (Pet., p. 22). In so doing, the Union argues, the Ninth Circuit overstepped its bounds and exceeded the scope of

authority granted to it by this Court in the "Steelworkers Trilogy."[6] This "unwarranted departure" from precedent thus serves as the basis for the Union's contention that this case merits this Court's discretionary review.

To assert these contentions, however, Local 315 misapprehends the rules of law this Court set forth in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).[7] Furthermore, the Union does not

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[6] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[7] Moreover, despite the comprehensiveness of that decision, the Union suggests that "this case is to be resolved by a straightforward application of the principles stated in . . . [*Steelworkers v.*] *American Manufacturing*" (Pet., pp. 15-16). Apparently, the basis for this contention is the purported factual similarities between *American Mfg. Co.* and the present case. Thus, in an effort to utilize what it perceives as a favorable factual decision, the Union contends that *American Mfg. Co.* is persuasive because there is little difference between the arbitration clause in that case and the one at issue here. Presumably, this is so because both cases allegedly involve "interpretation and application" of the agreement.

The Union's reliance on this *Steelworkers* decision is misplaced because Local 315 ignores the dispositive difference between *American Mfg. Co.* and the present case: the fact that the arbitration clause in *Steelworkers* permitted arbitration of *any* dispute concerning the agreement – express, implied, or otherwise. Conversely, the clause in the present case unambiguously restricts arbitration to alleged violations of *express written provisions* of the agreement. This language necessarily negates arbitration of *implied* contract provisions. Therefore, *American Mfg. Co.* is inapposite and the Union's contentions lack merit.

comprehend the role this Court has imposed upon the lower courts when confronting the question of arbitrability.

In *AT&T Technologies*, this Court identified four principles governing the arbitrability of disputes: (1) arbitration is a matter of contract; (2) the court must decide the threshold issue of intent to arbitrate; (3) in deciding this issue, a court cannot rule on the merits underlying the dispute; and (4) the presumption in favor of arbitration may be overcome *either* by an express provision *excluding* certain grievances *or* "forceful evidence" of a purpose to exclude claims from that forum. *Id.* at 648-651, emphasis added. These principles establish a framework for the analysis which courts must conduct when deciding the threshold issue of intent to arbitrate.

When the court below applied these principles to the facts of the present case, it concluded that the parties did *not* intend to arbitrate disputes concerning the medical competence of the work force. Not only does the parties' labor contract expressly limit arbitration, the parties' 17-year bargaining history constitutes forceful evidence of the Company's intent to exclude from arbitration disputes concerning the medical competence of the work force.

Despite the correct application of these guiding principles by the Ninth Circuit, Local 315 argues that anything other than a superficial perusal of the contractual arbitration provisions violates the third tenet set forth in *AT&T Technologies*. Thus, the Union contends that a court cannot properly examine all the terms in a collective

bargaining agreement to ascertain whether specific disputes are arbitrable. According to the Union, this is so because such an examination impermissibly intrudes into the merits of the dispute.

The Company submits that the Union has misconstrued the permissible scope of a lower court's examination of the collective bargaining agreement. Furthermore, Local 315 apparently does not comprehend the duty this Court has imposed on lower courts when ruling on arbitrability. As explained below, the Ninth Circuit correctly performed its obligations to ascertain whether the parties intended disputes of the nature at issue here – those concerning the medical competence of employees – to be arbitrable. Moreover, in so doing, the court below carefully avoided examining the merits of the dispute. Thus, contrary to Local 315's contentions, the lower court ruling is not an "unwarranted departure" from past precedent and the Union's petition should be denied.

A. Although A Court Cannot Rule On The Merits Of A Dispute When Deciding The Threshold Issue Of Arbitrability, It Must Examine The *Nature* Of The Dispute To Properly Make This Determination.

The initial examination of a contract for purposes of determining arbitrability of disputes commences with the language of the parties' arbitration clause and any express exclusions therefrom. *AT&T Technologies*, 475 U.S. 643, 648-650. However, no decision of this Court has prohibited a lower court from scrutinizing the entire agreement to ascertain the parties' intent with respect to

the arbitrability of types of disputes. Thus, the Union's suggestions to the contrary lack merit.

Once a court has determined the scope of the arbitration provisions, its next task is to examine the parties' dispute in light of the contractual limits on arbitration. To perform this duty, the court must examine the *nature* of the dispute to determine "whether the claim is 'on its face governed by the contract.' " *Montgomery Mailers' Union No. 127 v. The Advertiser Company*, 827 F.2d 709, 714 (11th Cir. 1987), citing *American Manufacturing Co.*, 363 U.S. 564, 568. The Third Circuit also succinctly expressed a court's duty when it said:

> Careful review of *AT&T Technologies* illustrates that the Supreme Court has not weakened its enthusiastic endorsement of arbitration in labor disputes. However, the message is clear that courts must *carefully analyze the contractual language* to determine whether a particular dispute is arbitrable. *Although answering that question may entail some probing of preliminary substantive issues, that requirement will not relieve courts of the duty to decide arbitrability.*

Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N, 832 F.2d 31, 33-34 (3d. Cir. 1987) (emphasis added).

In the present case, the dispute between the parties concerns the medical fitness of an employee to return to work. The court below pinpointed the union's difficulty in contending that this dispute was arbitrable when it said:

> Aware that it must allege a violation of an express provision of the collective-bargaining agreement, the Union contends that Unocal has violated the employee's seniority rights under Article III of the

> contract by not reinstating the disabled employee. This contention, however, is conclusory and thus insufficient to allege the existence of an arbitrable controversy. The Union fails to allege how Simon's express seniority rights under the agreement have been violated. Indeed, the Union concedes in its brief and petition to compel arbitration that Simon *continues to accrue seniority*. Accordingly, the Union's allegation of a violation of Article III without supporting facts that would support such a violation is merely conclusory.
>
> *The agreement's seniority provisions in Article III contain nothing about disputes over the medical fitness of an employee to return to work*. Given the express language of the Agreement and the Union's acknowledgment that Simon's seniority continues to accrue, the Union fails to make out a violation of an express provision.

Teamsters Local 315 v. Union Oil Co. of California, 856 F.2d 1307, 1311 (9th Cir. 1988) (emphasis added; footnote omitted).

Local 315 challenges the propriety of the Ninth Circuit's examination of the language in the parties' agreement. The Union asserts that a mere statement that the seniority clause has been violated is an adequate basis upon which to order arbitration. Thus, according to the Union, the court below erred in going beyond that conclusory allegation to ascertain the parties' intent. In the Union's words:

> As the Steelworkers Trilogy specifies, the court below exceeded its authority in searching the agreement for language relevant to the merits of the dispute. Arbitration should have been ordered once it is determined that the parties are in dispute as to the interpretation and application of the seniority provisions, which of course are express, written provisions of the agreement. (Pet., p. 22).

The Union's argument is flawed. In accordance with the teaching of *AT&T Technologies*, the court below was obligated to carefully examine the language of the contract to determine whether disputes concerning medical competence are governed by the collective bargaining agreement.[8] Moreover, contrary to the Union's assertion, this limited inquiry into the *nature* of the dispute does not embroil the court in the rightness or wrongness of the Company's decision that Simon is not medically fit to work. Rather, it merely ascertains whether the negotiated scope of the arbitration provisions encompasses this type of dispute.

Additionally, the Union's argument is flawed because of Local 315's mischaracterization of the dispute.[9] The Union states the issue to be whether denying Simon the "right to work" violates the seniority clause. Even if this

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[8] The Union also misunderstands the meaning of the term "determined" and the court's role in ascertaining the scope of the agreement. Implicit in the Union's argument is the inference that mere mention that seniority is implicated "determines" that the parties are in dispute regarding the seniority clause. This is not the case. Indeed, given the meaning of "determine," the court cannot deduce whether the seniority clause is in dispute unless it ascertains this fact after consideration, investigation and reasoning. *See Webster's Third New International Dictionary* (3d Ed., 1971), G. & C. Merriam Company, Springfield, Mass., p. 616.

[9] Contrary to the Union's statements, the dispute between the parties does not concern the seniority clause at all. Instead, it concerns the Company's management right to ascertain the medical fitness of its employees to work. Undoubtedly, the contract is silent with respect to this issue.

Court adopted that definition of the dispute, the Union's contentions still would fail because the "right to work" is not an express written provision of the Contract. As such, disputes concerning the "right to work" are not arbitrable.

The Union attempts to circumvent this problem by arguing that whether the seniority clause includes an *implied* right to work is not at issue for the courts. Instead, the Union contends, this issue goes to the merits of the dispute. Therefore, only an arbitrator may examine the contract language to determine whether seniority implies a right to work. This contention assumes too much.

Summarizing the primary provisions of the parties' labor agreement, it is indisputable that Article IX requires an alleged violation of an express written contract term as a condition precedent to arbitration. This requirement is not only contained in Article IX, paragraph A governing the arbitrability of grievances, it also is repeated in paragraph D addressing arbitration procedure, and paragraph E governing limitations on arbitration. Thus, the parties unquestionably intended to make clear that only *express* terms of the contract would be subject to arbitration.

Additionally, to ensure that there would be no ambiguity regarding the scope of arbitration or the source of any rights in that regard, the parties drafted paragraphs A and B of Article XXII. These provisions unequivocally state that the *source* of any rights asserted in arbitration must be contained within the *express* provisions of the

contract. Furthermore, the management rights clause reiterates the Company's *sole* right to manage its work force *unless* that right expressly has been abrogated by a written provision of the contract.

Despite these unambiguous contract provisions, the Union insists that the seniority clause is at issue because "the function of a seniority clause in the circumstances of this case is to determine the right to work." (Pet., p. 22). However, this contention is fallacious because it requires the court to *imply* terms into the seniority clause before compelling arbitration. Manifestly, this would violate the parties' intent to arbitrate only violations of *express*, written provisions of the agreement.

B. Undisputed Evidence Of Bargaining History Constitutes "Forceful Evidence" Of Unocal's Intent Not To Submit Disputes Of This Nature To Arbitration.

The Union's petition also highlights the undisputed evidence of bargaining history submitted by Unocal to the district court and reviewed by the court below. It then concludes that "all of this is at best equivocal, and much is not material to the question of arbitrability." (Pet., pp. 23-24). Presumably, the basis for the argument is this Court's statements favoring a presumption of arbitrability when labor contracts contain arbitration clauses. *See AT&T Technologies*, 475 U.S. 643, 650-651. The Union thus argues that undisputed evidence of the parties' bargaining history is inadequate to rebut the presumption favoring arbitration, although no rationale is offered for this statement.

The Company submits that the Union misperceives the purpose and function of this type of evidence. In the district court, the Company presented evidence demonstrating that it never accepted Union proposals to broaden the narrow language of the arbitration clause. The purpose of this evidence was to rebut the presumption favoring arbitration. The Union made no effort to refute the Company's evidence in that forum. However, the Union now takes the position – as it did in the court below – that the Company's evidence is not persuasive. Other than this assertion, there is no proffered reason why the court below should be barred from examining this undisputed evidence to ascertain whether Unocal ever intended to broaden the arbitration clause or permit third parties to examine employees for purposes of determining medical fitness. Indeed, despite the Union's subjective opinion of this undisputed evidence, the Ninth Circuit reviewed it extensively and found it "most important" on the issue of arbitrability. This was so, because without bargaining history to explain the genesis of the labor agreement, the court could not understand the significance of the parties' contract. Expressed in terms of Justice Brennan's concurrence in *American Mfg. Co.*, 363 U.S. 564, 570:

> Words in a collective bargaining agreement . . . are to be understood *only* by reference to the background which gave rise to their inclusion. [emphasis added].

In the present case, the background evidence of the parties' agreement reveals that arbitration was to be narrowly circumscribed and exclude disputes concerning the medical competence of the work force.

CONCLUSION

For the reasons stated, Respondent Union Oil Company of California respectfully submits that this Court should deny the Petition for Writ of Certiorari.

DATED: December 23, 1988

Respectfully submitted,

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APPENDIX A

ARTICLE XVI
SICK PAY

Regular full-time employees will be granted sick pay allowance for working time lost because of sickness or accident in accordance with the following provisions:

A. Employees will be eligible for sick pay allowance upon the completion of six (6) months of accumulated service with the Company

B. Upon completion of six (6) months' service, six (6) days of sick pay allowance at the employee's permanent assignment rate will be credited.

Thereafter, additional sick pay allowance will be accumulated at the rate of one (1) day for each completed month of service, plus three (3) days for each completed year of service to a maximum of one hundred and fifty (150) days. In no event will total accumulated sick pay allowance exceed one hundred and fifty (150) days.

C. Sick pay allowance for eligible employees will commence on the first (1st) scheduled working day lost because of illness or injury. If the employee cannot, due to sickness or injury, report for work as scheduled, it shall be the responsibility of the employee to notify the Company without undue delay of any such sickness or injury.

D. Fourteen (14) calendar days following the employee's return to his full-time regular schedule, any sick pay allowance accumulated during a period of sick leave will be credited and available for future periods of sick leave. Available days of sick pay allowance will be reduced by one full day for each scheduled workday the employee is absent due to sickness or injury and for which he receives sick pay. Sick pay

allowance will continue to be credited to the employee at the rate of one (1) day for each completed month of service, plus three (3) days for each completed year of service until a maximum of one hundred and fifty (150) days is reached.

E. Working time lost shall include only those hours normally and regularly scheduled at straight time. Sick pay allowance for scheduled working time lost due to sickness or injury will be at the vacation rate of pay. The amount of sick pay allowance payable will be reduced by any temporary disability benefits or indemnity that the employee may become entitled to under or by virtue of any Federal, State or other statutory disability benefits or Workers' Compensation Law. The sum of the two payments will equal the full sick pay allowance.

F. When the sick pay allowance is reduced by offsetting payments derived from California Disability Insurance or its alternate voluntary plan and these benefits are solely provided by tax or premium on the employee, such offsetting payments shall in turn be credited to the employee as follows:

1. Sick pay allowance will be credited to the extent that offsetting payments reduce the sick pay allowance and the credited amount will be converted to equivalent sick pay allowance days or fractions thereof.

2. These equivalent sick pay allowance days will be available for immediate or future use. This credit is in addition to days credited for completed service, but is subject to the maximum limitation set forth in Section B above.

G. *Payment of sick pay allowance will cease:*

1. When all available sick pay allowance benefits credited the employee have been used.

2. When the employee returns to work or is released by a doctor to return to work and subject to verification by a physician designated by the Company.

3. When service is terminated for any reason, including death and retirement.

H. Sick pay will not be allowed to an employee when absence from work is due to any of the following:

1. The willful intention of the employee to injure himself or another.

2. Use of narcotics except as prescribed by a physician.

3. Pregnancy.

4. Occupational disease or injury incurred while working for another employee.

5. Intoxication.

6. Dental conditions, except when the condition is disabling.

I. Sick pay allowance will not be granted for sickness or injury commencing during a leave of absence without pay for a period of more than thirty (30) consecutive days. Sick pay allowance will be granted for illness or injury commencing within an authorized leave of absence without pay of thirty (30) consecutive days or less and continuing beyond the scheduled date for return to work. If sickness or injury occurs during an approved leave of absence with pay, sick pay allowance will be granted for the normal number of scheduled work days during the period of sickness or injury. Sick pay allowance will not be charged for a recognized holiday for which the employee received holiday premium pay.

J. Sick pay allowance will not be granted to employees who become disabled due to sickness

or accident while they are on vacation except under the following conditions:

If an employee becomes disabled for one (1) week or more due to sickness or injury, then the full week or weeks of vacation remaining at the time the disability commenced may be cancelled and the employee placed on sick leave. Such disability shall be supported by medical evidence acceptable to the Company. The cancelled week or weeks of vacation will be rescheduled at a later date in the current year.

K. Sick pay allowance claims must be supported by proper medical evidence as required by the Company and are subject to verification by the Company.

L. For purposes of this Article XVI, a day of sick pay shall be eight (8) hours' straight-time pay. When an eligible employee working a ten (10) hour daily schedule shall lose time because of illness, he shall be allowed straight-time pay for scheduled working time lost but his accumulated sick pay balance will be charged in increment hours; i.e., ten (10) hours' sick pay shall be charged as one and one-fourth (1-1/4) days.

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ARTICLE XXII
LIMITATIONS

A. This contract constitutes the entire agreement between the parties and is not subject to negotiations during its term. The express provisions of this Agreement shall be the sole source of any rights which may be asserted against the company in arbitration under Article IX above. Further, this contract can only be amended by written agreement.

B. It is understood and agreed by the Union that, except as abridged by a specific provision of this Agreement, the Company reserves and retains the right to exercise, solely and exclusively, all lawful power to manage and control its business and its work forces, and to contract with others for the performance of any required work. The exercise of all lawful management rights which are not abridged by a specific provision of this Agreement shall not be subject to arbitration under Article IX above.

C. Disputes concerning any liability or obligation which requires the construction or interpretation of any statute or law shall not be subject to arbitration hereunder (or eligible for processing under the grievance procedure). This Agreement shall not in any way interfere with the obligations of the parties hereto to comply with the State and Federal Laws, or of any rule, regulation or order issued by any governmental authority pertaining to matters covered herein. If any provision or provisions of this Agreement should be affected by State or Federal laws, or of any rule, regulation, or order issued by any governmental authority, or if any provision or provisions should be held invalid by a court of record, the remainder of the Agreement shall not be otherwise affected thereby.